No. 89-1181

In The

Supreme Court of the United States

October Term, 1989

BURLINGTON NORTHERN RAILROAD COMPANY EMPLOYEES,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE LEGISLATIVE BOARD OF UNITED TRANSPORTATION UNION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

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This brief amicus curiae is filed with the written consent of the parties. The letters giving consent accompany this brief filed with the Court.

OPINION BELOW

The Supreme Court of the State of Montana issued its Opinion in this case which is reported at 781 P.2d 1121 (1989). A copy of the Montana Supreme Court's Opinion is also included in the Petition for Writ of Certiorari at

Petitioner's Appendix A-11. The *amicus curiae* cites the Petitioner's Appendix when reference is made herein to the Opinion.

INTEREST OF THE AMICUS CURIAE

The Washington Legislative Board of the United Transportation Union represents State of Washington chapters of the United Transportation Union. The office of the *amicus curiae* is located at Olympia, Washington. The Petitioners, Burlington Northern Railroad Company Employees, are members of the United Transportation Union. The Washington Legislative Board oversees and promotes the legislative interests of the Washington United Transportation Union employees.

The Petitioners are all residents of the State of Washington. State taxation of income of non-resident employees of transportation companies is of particular interest to transportation employee residents of the State of Washington, because Washington does not have an income tax. Because of the absence of a State income tax, there is no income tax credit in Washington available to resident transportation employees on account of taxes paid to another State. Any foreign State income taxes imposed on Washington transportation employees are therefore extra tax burdens. For Washington resident transportation employees who pass through several income tax States, the heavy tax burden is compounded. An additional burden is the withholding and reporting requirement imposed by multiple jurisdictions. (For a

discussion of the overall tax problems of interstate transportation employees, see S. Rep. No. 1261, 91st Cong. 2d Sess. (1970) in the Appendix hereto.)

Since 1982 the Washington resident rail transportation employees, some of whom are the Petitioners herein, have been engaged in disputes with both the States of Montana and Idaho respecting the application of State income taxes to them. The imposition of Montana and Idaho income taxes arose by virtue of their employment on transcontinental "through" freight trains which traverse both States. The Idaho dispute was resolved in 1988 in the Supreme Court of Idaho in *Blangers v. Idaho*, 763 P.2d 1052 (Ida. 1988), *cert. denied*, ___ U.S.___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).[1] The Idaho Supreme Court held that there was insufficient nexus present under either the due process clause (Amend XIV, §1) or commerce clause (Art I, §8, cl. 3) of the U.S. Constitution to subject the employees to Idaho income tax.

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[1] The tax disputes have been disruptive of relations between the different States involved. The Idaho dispute with the Washington transportation employees resulted in what the media termed "a tax border war" between Washington and Idaho. The Washington and Utah legislatures because of income tax disputes with Idaho during this period over the transportation employee issue, enacted retaliatory legislation against Idaho residents. The Idaho legislature ultimately enacted Idaho Code §63-3023B which exempted transportation employees earning less than 50% of their compensation in Idaho from Idaho income taxes. If the Congressional enactment 49 U.S.C. §11504(d) had been followed, it is unlikely the States would have pursued these matters and these disruptions and the problems confronting the transportation employees would not have occurred.

Several of the Employees have brought a legal action in a Montana court[2] for a determination of whether they are subject to Montana income tax or whether the constitutional nexus principles followed in *Blangers* apply. When assigned to these particular transcontinental routes across Idaho and Montana, these employees board the transcontinental "through" freight trains in Spokane, Washington, and travel across Idaho to Whitefish, Montana. At Whitefish they leave the trains, which continue eastbound on a transcontinental route. After a rest period at Whitefish, as required by federal law, the employees return on westbound trains to Spokane. The employees receive their train orders from outside both the States of Idaho and Montana.

In 1970 Congress enacted Public Law 91-569, which included what is now 49 U.S.C. §11504, the statute at issue in this case. 49 U.S.C. §11504 does not deal *directly* with the taxation of interstate transportation employees. Rather, the statute limits the furnishing of income tax information and other reports by an employer to the State of an employee's residence and the State where the employee earns more than 50% of his income. The employees in this case do not earn more than 50% of their income in Montana.

The only issue in this case is whether Burlington Northern Railroad Company must furnish income tax information and other reports to the Montana Department of Revenue pertaining to non-resident transportation employees. The case does not deal with the question

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[2] *Grooms v. Montana*, Flathead County, Montana, District Court Cause No. DV-89-242B. The hearing on this Declaratory Judgment action is still pending.

of whether the employees are taxable in Montana. However, the Montana Supreme Court in its Opinion, assumes that the employees are subject to Montana income tax because "such employees, while in Montana, enjoy the comfort and protection of Montana's civil and criminal laws, and so must share a proportionate burden of the cost of such protections". *Burlington Northern Inc. v. Montana Department of Revenue* Opinion at A-11, 12 of Petitioner's Appendix. Whether the Employees are taxable in Montana is in dispute.[3] In any event the Montana taxability of the Employees is not an issue in this case. The only issue is Montana's *power* by subpoena or otherwise to require the employer to furnish employee tax information under the provisions of 49 U.S.C. §11504.

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[3] The assumption by the Montana Supreme Court that the employees are taxable in Montana, although unnecessary to the Opinion, also apparently prejudges the dispute in *Grooms, supra* note 2. The Montana Supreme Court Opinion ignores *Blangers* which deals with the general and constitutional taxation principles applicable to the unique situation of these workers whose employment on interstate trains takes them across Montana and Idaho. The Supreme Court of Idaho in *Blangers* held that the constitutional nexus required for imposing a State income tax involves more than providing a non-resident traveler protection and comfort while within the taxing state. A contrary holding would have meant that *any* non-resident working traveler traversing a taxing State would be subject to that State's income tax regardless of whether the traveler did any business in that State, an untenable result.

REASONS FOR GRANTING THE PETITION

A. THE LEGISLATIVE HISTORY OF 49 U.S.C. §11504 INDICATES THAT THIS LAW WAS ENACTED TO RELIEVE THE BURDEN ON INTERSTATE COMMERCE CAUSED BY THE INCOME TAX POLICIES OF SOME STATES INSOFAR AS SUCH POLICIES AFFECT THE INCOME OF INTERSTATE CARRIER EMPLOYEES.

What is now 49 U.S.C. §11504(d) was enacted in 1970 and reads as follows:[4]

> (d) A rail . . . private carrier withholding pay from an employee under subsection (a) or (b) of this section shall file income tax information returns and other reports only with –
>
> > (1) the State and subdivision of residence of the employee; and
> >
> > (2) the State and subdivision in which withholding of pay is required under subsection (a) or (b) of this section.

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[4] Between the date of its enactment in 1970 and 1978 this provision, though not in these exact words, was embodied in 49 U.S.C. §26(a). 49 U.S.C. §26(a) was recodified in its substance along with other Interstate Commerce Act provisions in 1978 in P.L. 95-473 to its present 49 U.S.C. §11504(d). It should also be noted that the House proposal to restrict income tax reporting requirements found in HR 10634 in 1970 was even more restrictive than the Senate proposal ultimately adopted by the House-Senate Conference Committee. The House, though recognizing possible tax liability to a transportation employee, would have limited income tax information reporting to the State of employee residence only. See first paragraph of quotation from Conference Report No. 91-1666, 91st Cong., 2d Sess. (1970) "Filing Information Returns" *infra* p. 7.

The Senate-House Conference Committee makes the following statement concerning what is now 49 U.S.C. §11504(d):

> FILING INFORMATION RETURNS
>
> The House bill provided that only the State of the employee's residence could require the filing of information returns for income tax purposes.
>
> The Senate amendment provided that both the State of employee's residence and the State in which he earned more than 50% of his compensation could require the filing of information returns for income tax purposes.
>
> The conference substitute follows the Senate amendment.

Conference Report No. 91-1666, 91st Cong. 2d Sess. (1970).

Further legislative history of 49 U.S.C. §11504 are found at S. Rep. No. 1261, 91st Cong. 2d Sess. (1970), relevant portions of which are reprinted herein. Amicus Appendix, pp. 1 to 7. S. Rep. 1261 indicates that there was an extensive legislative hearing on this legislation with testimony taken from State tax agencies, governmental transportation officials and representative of the transportation industry itself. (Amicus Appendix, pp. 3 and 4.) The burdening of interstate commerce by the income tax policies of some States necessitated the legislation. (Amicus Appendix, pp. 1 and 2.)

S. Rep. 1261 points out not only the problems of employers who must withhold tax and report payroll information for multiple States but also the State income

tax problems of transportation employees who traverse multiple States in the course of their employment:

> There is no uniform taxing formula which must be applied by the States with the result that it is possible for an employee to be subjected to tax liability in a number of different states. (Amicus Appendix, p. 3.)

49 U.S.C. §11504 was enacted to benefit both the employer, burdened with administrative reporting requirements, and the employee, burdened with paying taxes and reporting income in multiple States. As evidenced by the Committee Reports, Congress was concerned with the lack of uniformity in the State practices respecting the ambulatory transportation employees, and what ultimately was enacted as 49 U.S.C. §11504(d) was the solution of Congress to multiple and inconsistent tax reporting requirements which burdened interstate commerce. Congress did not exempt interstate employees from taxation in States where they do not earn more than 50 percent of their income. Nor did Congress forbid States from taking other steps to collect taxes from nonresident workers, such as contacting the workers directly. Congress did, however, mandate in 49 U.S.C. §11504(d) that if any employee does not earn more than 50 percent of his income in any given State, income tax information shall *not* be furnished by the employer to that State unless it is the State of the employee's residence. Moreover, S. Rep. 1261 specifically indicates that a State which is neither the residence nor more than 50% earnings State of the employee (e.g. Montana in this case) *lacks the power* to require the employer to furnish employee tax information. (Amicus Appendix, p. 7.)

B. THE MONTANA SUPREME COURT DECISION VIOLATES 49 U.S.C. §11504 AND SHOULD BE SET ASIDE AS VIOLATING THE COMMERCE AND SUPREMACY CLAUSES OF THE U.S. CONSTITUTION.

This case arises from a collision between the power of the Congress under the Commerce Clause (Art. I, §8, cl. 3) to limit the manner in which States may enforce their tax laws against nonresident employees of interstate carriers and the power of the State of Montana to choose the method of enforcing its tax laws. The Supremacy Clause (Art. VI, cl. 2) requires that the laws of Montana yield to laws enacted by Congress. *Gibbons v. Ogden*, 22 U.S. 186, 9 Wheat. 186, 6 L.Ed. 23 (1824). Congress did not merely suggest in 49 U.S.C. §11504(d) that the payroll information under the circumstances of this case not be furnished; it prohibited it.

The decision of the Montana Supreme Court asserts an unfettered power by the State of Montana to require the furnishing of earnings information of non-resident employees of interstate carriers:

> Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresident employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce.

Burlington Northern, Inc. v. Montana Department of Revenue, Opinion at p. A-11 of Petitioner's Appendix. The Opinion is a direct challenge upon the authority of Congress to

limit the manner in which States may enforce their taxation statutes against nonresidents.

That Congress intended to exercise its power under the Commerce Clause is illustrated by the legislative history of 49 U.S.C. §11504. Contrast the following statement from S. Rep. No. 1261 with the quotation immediately above from the Opinion of the Montana Supreme Court in this case:

> The Senate Commerce Committee in favorably reporting this legislation determined that interstate commerce is unreasonably burdened by certain income taxation policies of some States insofar as such policies affect interstate carrier employee's income.

S. Rep. No. 1261, 91st Cong., 2d Sess. (1970). (Amicus Appendix, pp. 1 and 2.)

There cannot be two more diametrically opposed perspectives than that of the Congress which views some taxation reporting requirements imposed by States upon non-resident interstate carrier employee's income as an unreasonable burden upon interstate commerce, and that of the State of Montana which views the mandatory furnishing of tax information from such employees as not being an unreasonable burden. However, Congress expressly exercised its power under the Commerce Clause by enacting 49 U.S.C. §11504, resulting, therefore, in a direct conflict between the application of an otherwise valid Montana enactment and federal law, which conflict must be resolved in favor of the federal enactment. *Hamm v. Rock Hill*, 397 U.S. 306, 311-312, 85 S.Ct. 384, 13 L.Ed.2d 300 (1964).

C. EVEN ABSENT CONGRESSIONAL ACTION, THE MONTANA INCOME TAX INFORMATION REQUIREMENTS AND UNDERLYING TAX VIOLATE THE COMMERCE AND SUPREMACY CLAUSES.

State legislative authority to burden interstate commerce is narrowly circumscribed by the dormant commerce clause, which grants to Congress plenary power over it. *Cf. Amerada Hess v. New Jersey*, 490 U.S. ___, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). Thus even before Congress takes specific action with respect to State tax or regulatory requirements, States lack the authority to enact laws which unduly burden interstate commerce. *Id.; see generally* Rowland and Vaché, *Taxing a Moving Target*, 22 Idaho L.Rev. 343 (1986).

In this case, both reporting requirements and the underlying State income tax would be preempted by the effect, in each case, of unduly burdening interstate commerce, even absent Congressional action. In 1970, the Senate Commerce Committee concluded, after extensive hearings, that the withholding and payroll reporting State tax problems faced by *both* employers and employees unreasonably burden interstate commerce. S. Rep. No. 1261, 91st Cong. 2d Sess. (1970); Rowland and Vaché, *supra*, 22 Idaho L.Rev. at 375. The Idaho Supreme Court agreed in *Blangers v. Idaho*, 763 P.2d 1052 (Ida. 1988), *cert. denied*, ___ U.S.___, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

But this is *not* a case involving Congressional inaction. Congress has very clearly spoken in 49 U.S.C. §11504, and this Court has repeatedly stated that conflicting State laws must give way to Congressional action. *E.g., Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 19 L.Ed. 387

(1869); *Jones v. Rath Packing Co.*, 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); *cf. Amerada Hess, supra.*

Respondent herein may argue that Montana's tax and reporting requirements do not "conflict" with 49 U.S.C. §11504. However, the construction given 49 U.S.C. §11504 by Montana is wide of the mark and such construction only avoids conflict with §11504 by rendering the provisions of §11504 completely ineffective and meaningless. This Court has repeatedly stated that courts are obliged to give effect to every word Congress used, and every part of a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 60 L.Ed.2d 931, 99 S.Ct. 2326 (1979); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 86 L.Ed.2d 168, 105 S.Ct. 2587 (1985).

If we give effect to every part of 49 U.S.C. §11504, we see that Congress prohibited States from collecting income tax information from employers regarding nonresident interstate carrier employees not earning more than half their income in such States. Petitioners fit squarely within this class. Yet Montana insists that it is free to collect such withholding information from Petitioner's employer and that so doing does not conflict with 49 U.S.C. §11504.

Such an anomalous result should not be tolerated. This Court should accept review of the instant case, and reverse.

CONCLUSION

This case presents the singular and concise question of the supremacy of Congress in regulating interstate commerce in enacting an important federal statute. The Montana decision nullifies in Montana the federal statute 49 U.S.C. §11504(d). The Montana decision unless reversed may also serve as a precedent in other States for the ignoring of the federal law. For the reasons set forth above the *amicus curiae* requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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February 20, 1990

APPENDIX

INCOME TAXATION – INTERSTATE CARRIERS AND EMPLOYEES

House Report (Interstate and Foreign Commerce Committee) No. 91-1195, June 15, 1970 [To accompany H.R. 10634]

Senate Report (Commerce Committee) No. 91-1261, Oct. 1, 1970 [To accompany H.R. 10634]

Conference Report No. 91-1666, Dec. 3, 1970 [To accompany H.R. 10634]

Cong. Record Vol. 116 (1970)

DATES OF CONSIDERATION AND PASSAGE

House September 14, December 8, 1970

Senate October 12, December 8, 1970

The Senate Report and the Conference Report are set out.

SENATE REPORT NO. 91-1261

The Committee on Commerce, to which was referred the bill (H.R. 10634) to amend the Interstate Commerce Act and the Federal Aviation Act of 1958 in order to exempt certain wages and salaries of employees from withholding for income tax purposes under the laws of States or subdivisions thereof other than the State of subdivision of the employee's residence, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

BACKGROUND AND NEED SECTION

The Senate Commerce Committee in favorably reporting this legislation determined that interstate

commerce is unreasonably burdened by certain income taxation policies of some States insofar as such policies affect interstate carrier employee's income.

The problem addressed by this legislation is peculiar to those employees who are required by the nature of their employment to work in more than one State on a regular basis. Tax policies in some States have created great hardships both for interstate carriers and interstate carrier employees. Certain States have insisted upon withholding from employees an amount based upon the employee's entire annual income even though the portion of the employee's income derived from performance of duties within the State in question may have represented a very small proportion of his total income. In many instances this has meant that some employees were deprived of a substantial amount of their income throughout the year. It is no answer that at the end of the year a good portion of that money might be returned to the employee.

The employer is also confronted with serious problems. State withholding provisions typically require that the employer determine the amount of income earned by an employee in a particular State and that the employer take care of all other administrative details that are related to withholding. Some States which do not require withholding nonetheless require the employer to file periodic information returns. Where several States and numerous employees are involved, the administrative load can be extremely onerous for the employer.

However, withholding and the requirement of filing information returns with all of the jurisdictions asserting

a right to tax any portion of the compensation of the employee are not the only problems. For the employee multiple State tax liability is itself a burden. There is no uniform taxing formula which must be applied by the States with the result that it is possible for an employee to be subjected to tax liability in a number of different States.

In hearings before the committee, numerous witnesses, representing all manner of viewpoints on the issues, appeared or provided statements for the hearing record. Included among those who testified were representatives of the Interstate Commerce Tax Reform Committee (a group formed by certain members of the International Brotherhood of Teamsters; Flight Engineers International Association; Marine Firemen's Union of the SIU; Sailor's Union of the Pacific, SIU; National Engineer's Beneficial Association; the Airline Pilots Association, and the Marine, Cooks, & Stewards of the Seafarer's International Union); the Brotherhood of Locomotive Engineers; Association of American Railroads; Wester Highway Institute; National Association of Motor Bus Owners; Congress of Railway Unions; Multistate Tax Commission; Flight Engineers' International Association, AFL-CIO; American Trucking Associations, Inc; Air Lines Pilots Association; Greyhound Lines; Department of Revenue for the State of Arkansas; National Association of Tax Administrators; Tax Commissioner for the State of North Dakota; New York State Department of Taxation and Finance; Bureau of Revenue for the State of New Mexico; State of Nebraska, Income Tax Division; Department of Revenue for the State of Iowa; Director of Revenue State of Illinois; Income Tax Division, State of

Alabama; State Tax Commission, State of Nebraska; Department of Revenue, State of Alaska; Department of Revenue, State of Washington; and Air Transport Association.

The hearing record provides several examples of the difficulty. One trucking company provided the committee with information showing that it had numerous drivers who worked in several different States. For example, 342 of its drivers drove in 19 different States, 397 of its drivers drove in 11 States and hundreds of additional drivers for just this one company worked regularly in five or more States. If the majority of those States taxed the income of the driver, it can readily be seen that the employer and the employee would be faced with a monumental task of first of all determining tax liability and secondly complying with the individual tax laws of every one of those States. Some of the difficulties created by multiple State taxation were set forth in the hearings. For example the following assertions were made:

> (1) Proper withholding for nonresident employees requires complete knowledge of what are often numerous and often complicated State laws, rules and regulations.
>
> (2) Determination of the exact amount to be withheld is very difficult, due to lack of uniformity among the State withholding laws.
>
> (3) Payroll procedures, even though in many instances computerized, are subject to continuous change because the routes traversed by an individual driver or airline pilot vary from State to State and in the case of airlines probably vary on each flight.

(4) The cost of administering the nonresident withholding requirements is extensive.

(5) In the majority of instances, cost of administration exceeds the amount of tax withheld and transmitted to the State.

One of the more burdensome problems is confronted by airline pilots who in the course of a few hours of employment might fly over several different States. And these pilots for the same general route may fly over different States for different periods of time each time that same route is flown.

To be sure, not all States impose net income taxes on individuals. But at the present time 38 States do impose such a tax. All of those States require withholding on the full amount earned by residents and 31 of those States require withholding on amounts earned by residents and nonresidents within their borders. In addition, numerous cities impose income taxes and require withholding as to both residents and nonresidents.

The original version of S. 2044 and H.R. 10634 related solely to the withholding and reporting problems. Each State except the State of residence would have been precluded from requiring reporting or withholding for tax purposes from the wages of interstate carrier employees.

It became apparent in the course of the committee's hearings and later deliberations on the problems confronting interstate carrier employees that elimination of multiple withholding was only a partial answer and, in fact, could place the employee in greater jeopardy than he would have been had the bill not been passed. This is true because the elimination of a State's power to require

withholding has no bearing on the State power to tax. So it could easily happen that an employee would find himself at the end of the year with tax liability in several States but with an inadequate amount of money withheld and consequently a very serious and unexpected financial burden. Indeed, it has come to the Committee's attention since the hearings that certain railroad employees and others are being required to file information returns prior to the taxing date. On the other hand, the hearing record includes testimony expressing concern that a bill confined to limiting withholding and the filing of information returns to the State of an interstate carrier's employee's residence, as originally contemplated, might induce non-resident interstate carrier employees to evade non-resident State income taxes which might properly be due.

The Committee concluded, therefore, that legislation in this area would be incomplete if it did not address the very basic problem of multiple State tax liability along with the problem of multistate withholding and/or reporting for taxation purposes.

SUMMARY OF BILL

The amended bill does three basic things:

(1) Limits power to tax income of interstate carrier employees to the employee's State of residence *and* any State in which he earns more than 50 per centum of the compensation paid to him by such employer;

(2) Limits power to require withholding for tax purposes from income of interstate carrier employees to

either the State in which such employee earned more than 50 per centum of the compensation paid to him by such carrier during the preceding calendar year *or* the State of residence;

(3) Limits the power to require the filing of information returns to the State of residence *and* the State by which withholding may be required.

* * *